Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-300

In the Supreme Court of the United States

OCTOBER TERM, 1986

JIMMY E. FROST, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ANDREW J. ADAMS, JR.
Col., OTJAG, USAF

JOSEPH S. KISTLER
Maj., OTJAG, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

12pp

QUESTION PRESENTED

Whether petitioner was denied a fair trial on the ground that a portion of his urine specimen, which was subjected to a standard laboratory urinalysis prior to trial, was inadvertently destroyed.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

California v. *Trombetta*, 467 U.S. 479	5, 6, 7, 8, 9
United States v. *Harper*, 22 M.J. 157	8
United States v. *Kern*, 22 M.J. 49	9

Statute:

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
10 U.S.C. 846	9
10 U.S.C. 934	1

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-300

JIMMY E. FROST, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 22 M.J. 386. The opinion of the Air Force Court of Military Review (Pet. App. 2a-6a) is reported at 19 M.J. 509.

JURISDICTION

The judgment of the Court of Military Appeals (Pet. App. 1a) was entered on July 17, 1986. The petition for a writ of certiorari was filed on August 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Following a special court-martial, petitioner was convicted of the wrongful use of marijuana, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934 (R. 151). He was sentenced to one month's confinement, forfeiture of $200, a reduction in

rank to the lowest enlisted grade, and a bad conduct discharge (R. 162). The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 2a). On discretionary review, the Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. On August 11, 1983, petitioner and the other members of his military unit provided urine samples at Holloman Air Force Base in New Mexico as part of a drug testing program (R. 85; GX 1).[1] Portions of petitioner's sample were later tested by four different methods; each test was positive for marijuana (R. 55-59).[2]

Under the standard urinalysis testing procedure, which was followed in this case, the servicemember who is tested provides a sample of urine at his duty station, and a bottle containing that sample is forwarded to the Brooks Air Force Base Drug Abuse Detection Laboratory for testing (R. 85-87, 96-99). At the laboratory, portions of the original sample are poured for testing (R. 39-42, 102). If the initial screening and confirmation tests are positive for narcotics, the original sample is retained (see R. 50-51, 105; AX 20).

---

[1] Petitioner was in the same unit as the petitioner in *Krueger* v. *United States*, petition for cert. pending, No. 85-2096; petitioner and Krueger provided urine samples at the same time; they were represented by the same defense counsel; and their courts-martial took place on successive days.

[2] Petitioner's sample was initially tested by radioimmunoassay analysis, and the positive test result was then confirmed by gas liquid chromatography/flame ionization detection and gas chromatography/mass spectrometry analyses at Brooks Air Force Base, Texas (R. 55-58). Those three positive test results were later confirmed by a different gas chromatography/mass spectrometry technique at the University of Utah Center for Human Toxicology (R. 55, 57, 59).

In this case, the analysis of petitioner's urine sample on August 19, 1983, revealed the presence of marijuana (R. 50-51). Officials at Holloman Air Force Base directed the Brooks laboratory in September 1983 to retain petitioner's urine sample pending court-martial proceedings (AX 20). On September 27, 1983, a portion was poured from the source sample and taken to the Brooks Toxicology Division for further testing (R. 49-50, 110-111). That test was also positive for marijuana (R. 50-51; GX 4). The remainder of that portion of the sample was kept in the Brooks Toxicology Division safe (R. 111-112).

In late September 1983, petitioner sought access to his urine sample so that an independent test could be performed at the government's expense (AX 18, 19). On November 8, 1983, the government asked petitioner's counsel to provide the information necessary for the sample to be sent under a chain of custody to a civilian laboratory for testing (AX 21). The defense, however, did not provide the government with the sought-after information until early 1984 (R. 69-70; AX 31).

In November 1983, the government determined that petitioner's source urine sample had been inadvertently destroyed at some time after September 27, 1983 (AX 23; R. 42, 51-52).[3] Only the portion of the sample that had been analyzed at the Brooks Toxicology Division was still in existence (R. 42, 51). The government notified petitioner's counsel that the remainder of that portion would be sent to an independent civilian laboratory at the University of Utah for further testing, and that the sample would be consumed by the test (AX 23). Petitioner's

---

[3] The person responsible for retaining urine samples at the Brooks laboratory testified that seven or eight samples had been inadvertently destroyed between April 1983 and March 1984; the laboratory analyzed approximately 22,000 urine samples per month during that period (R. 43).

counsel did not object to the procedure (*ibid.*). The remainder of the sample was sent to the University of Utah on November 28, and it tested positive for marijuana on December 5 (GX 5, 6, 12; R. 57, 127, 132-133). The following day, petitioner's counsel informed the government that he "never formally objected [to]" and "never formally approved" the government's proposal to send the remaining portion of petitioner's urine sample to the University of Utah for retesting (AX 22).

During December 1983, the government learned that approximately one milliliter of petitioner's urine sample remained in existence at the Brooks laboratory (AX 23). The defense asked that the remaining portion of the sample be sent to the Schoenfeld Clinic Laboratory for analysis (AX 31). The sample was provided to the Schoenfeld laboratory (AX 12, at 5). Although it was possible to test the sample to determine if marijuana was present, no test was performed (*ibid.*).[4]

2. During a pretrial hearing, petitioner moved to dismiss the charges and to suppress the test results on the ground that the government's failure to preserve his urine sample for an independent analysis violated his right to due process. Petitioner argued that the destruction of his urine sample violated his due process rights, but he did not explain why another analysis would produce exculpatory evidence (R. 68-69; AX 12, at 1).

The trial judge denied the motion and made the following findings of fact (R. 72-73): (1) the defense made a timely request for an independent analysis of petitioner's urine sample; (2) the government asked the Brooks laboratory to preserve the urine sample, the laboratory knew of the request, and it had a duty to preserve the sam-

---

[4] Unlike in *Krueger* v. *United States, supra,* there was a sufficient amount of petitioner's urine sample remaining to perform a urinalysis test.

ple; (3) a portion of the sample was delivered to the Brooks Toxicology Division on September 27, 1983; (4) the parent urine sample was inadvertently destroyed sometime between September 27 and November 28, 1983, by an unknown person; (5) the remaining portion was sent to the University of Utah Center for Human Toxicology on November 28, 1983, after the defense had been notified on November 22, 1983; (6) the government made a good faith effort to have the sample independently retested; (7) the University of Utah Center for Human Toxicology was an independent laboratory; and (8) there was no reasonable basis for believing that another retest would produce any evidence favorable to the defense.

3. Relying on *California* v. *Trombetta*, 467 U.S. 479 (1984), the Air Force Court of Military Review rejected petitioner's claim that the urinalysis test results should have been suppressed (Pet. App. 3a-4a). Also relying on *Trombetta*, the Court of Military Appeals summarily affirmed (Pet. App. 1a).

ARGUMENT

Petitioner contends that he was denied a fair trial because the government inadvertently destroyed the bulk of his urine sample. That fact-bound claim was correctly rejected by the courts below, and it does not warrant further review.

1. The destruction of most of petitioner's urine sample did not prevent that sample from being independently analyzed. The remaining portion was independently analyzed at government expense, as petitioner had originally requested. When petitioner failed to submit the information necessary for an independent analysis at a laboratory of his choice, the government notified him that the sample would be sent to the University of Utah laboratory, where it would be analyzed and consumed. Petitioner had an opportunity to object to that procedure,

but he failed to do so. Accordingly, as the trial judge found, petitioner received exactly what he asked for: an independent analysis of his urine sample. In addition, following the University of Utah test, a small amount of the urine sample was discovered, and it was sent to the civilian laboratory of petitioner's choice. That laboratory had a sufficient quantity of petitioner's sample to test it for marijuana, but no test was performed. In these circumstances, petitioner cannot reasonably complain that he has been deprived of access to or an independent analysis of his urine sample.

2. There is also no reason to believe that petitioner's urine sample was exculpatory. As the Court explained in *California* v. *Trombetta*, 467 U.S. 479, 488-489 (1984) (footnote omitted), "[w]hatever duty the Constitution imposes on the [government] to preserve evidence, that duty must be limited to evidence that might be expected to play a significent role in the suspect's defense. To meet this standard of consitutional materiality, * * * evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." The facts of this case clearly show that the destroyed urine sample was not material under *Trombetta*.

First, four different types of laboratory tests uniformly detected the presence of marijuana in petitioner's urine sample. Petitioner's urine sample therefore did not possess an apparent exculpatory value before it was inadvertently destroyed. The trial judge found that there was no reason to believe that an additional test of petitioner's urine sample by the Schoenfeld Laboratory would have resulted in any evidence favorable to the defense (R. 73). Neither military court of appeals disturbed that finding, and it does not warrant review by this Court.

Second, the evidence at trial established that the type of analysis used at the University of Utah laboratory, as well as one used at the Brooks laboratory, was of undisputed validity in the scientific community (R. 59, 125).[5] Thus, as in *Trombetta,* the test result was wholly reliable.

Finally, the government introduced evidence regarding the calibration standards for the urinalysis equipment and the laboratory testing procedures, and a forensic toxicologist from the Center for Human Toxicology interpreted the standards, procedures, and data relevant to the analysis of petitioner's sample (R. 128-134). As in *Trombetta*, petitioner therefore had a reasonable opportunity to impeach the validity of the test results through cross-examination of the witness. Rather than attempt to do so, however, petitioner sought to show that he was not impaired at the time the urine sample was taken (R. 135), that the chain of custody from the Brooks laboratory to the Center for Human Toxicology was faulty (R. 138), and that the test results did not show that he was a "heavy user" of marijuana (R. 140-141). The inadvertent destruction of the bulk of petitioner's urine sample did not prevent him from presenting any of those defenses.

3. Petitioner contends (Pet. 5-6) that *Trombetta* is inapplicable and that a special rule regarding the destruction of evidence is necessary in the case of urine samples, because a negative urinanalysis test result has a powerful exculpatory effect. Even accepting the premise of petitioner's argument, his conclusion does not follow. A negative intoxilyzer test result would surely provide equally powerful exculpatory evidence, but *Trombetta* did not establish a special rule for the type of test at issue in that case. Beyond that, petitioner's argument would require the courts to adopt different materiality standards

---

[5] That procedure (gas chromatography/mass spectrometry) is used by the National Institute on Drug Abuse as a reference procedure (R. 125).

for each type of evidence that the defense could hope to adduce at trial, and each standard would need to be calibrated to the potential exculpatory effect different items of evidence would have. Neither *Trombetta* nor any other decision of this Court suggests that due process requires that type of fine tuning.

Petitioner also argues (Pet. 6-7) that urinalysis tests are less reliable than the intoxilyzer test involved in *Trombetta,* because there is a greater possibility of undetected human error with urinalysis tests. Evidence regarding the test procedures, standards, and data relevant to petitioner's sample were adduced at trial, however, and petitioner had the opportunity, through cross-examination, to expose any flaws in the manner by which those tests were performed. What is more, petitioner has failed to explain how the retention of his urine sample would have shed light on any error in the tests performed in this case or in the chain of custody of that sample.

Finally, petitioner suggests (Pet. 7-8) that this case is distinguishable from *Trombetta,* because a court-martial may infer that a defendant has wrongfully used marijuana based solely on a positive urinalysis test result.[6] Petitioner therefore argues that there is a greater need to preserve urine samples than breath samples, because of the greater inculpatory effect of a positive urinalysis test result. *Trombetta* cannot be distinguished on that basis, however. Under the state law at issue in *Trombetta,* a blood-alcohol concentration greater than 0.10% gave rise to a presumption of intoxication. 467 U.S. at 482. Petitioner's position was therefore no worse than Trombetta's, since petitioner could attempt to rebut the inference of wrongful use of marijuana by showing, for example, that he had unwittingly used the drug. Petitioner has not explained how retention of the bulk of his urine sample or any addi-

---

[6] See *United States* v. *Harper,* 22 M.J. 157, 162 (1986).

tional testing would have helped him demonstrate that he had innocently consumed marijuana. Accordingly, the courts below correctly held that this case is controlled by *Trombetta*.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ANDREW J. ADAMS, JR.
Col., OTJAG, USAF

JOSEPH S. KISTLER
Maj., OTJAG, USAF
Appellate Government Counsel
Government Trial and Appellate
Counsel Division

SEPTEMBER 1986

[7] Petitioner also argues (Pet. 8) that his urinalysis test results were inadmissible under Article 46, UCMJ, 10 U.S.C 846. However, the Court of Military Appeals held in *United States* v. *Kern*, 22 M.J. 49 (1986), that the *Trombetta* standard satisfies any special military due process requirements. Any alleged conflict between the Court of Military Appeals' decision here and in *Kern* is for that court to resolve.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/40014